Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

JEANNE BIGGS and CHARLES BIGGS,

Petitioners,

v.

EAGLEWOOD MORTGAGE, LLC and
COUNTRYWIDE BANK, N.A.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fourth Circuit affirmed the district court's award of summary judgment to Countrywide Bank, N.A. and Eaglewood Mortgage, LLC on a claim by homeowners under 18 U.S.C. § 1964 of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, based on use of payment option adjustable rate mortgages in violation of the mail fraud statute, 18 U.S.C. § 1341. The Fourth Circuit found error in the district court's reasoning for granting summary judgment, but affirmed on a new ground, i.e., that the Biggses were not setting out to prove "misrepresentation or their reliance thereon". (App. 10a) The Fourth Circuit's decision reading a "misrepresentation" requirement into the RICO statute and into "scheme or artifice" mail fraud is at variance with the Third Circuit (not requiring an affirmative misrepresentation to prove a RICO violation) and the Ninth, Tenth and Eleventh Circuits (not reading a "misrepresentation" requirement into "scheme or artifice" mail fraud).

Three questions are presented:

1. Does the mail fraud statute, 18 U.S.C. § 1341, require proof of misrepresentation for "scheme or artifice" mail fraud?

2. In a claim under the civil RICO statute, 18 U.S.C. § 1961 *et seq.*, in which the predicate acts under 18 U.S.C. § 1962(c) are "scheme or artifice" mail fraud, must "misrepresentation" be proven?

3. For victims of payment option ARM mail fraud to bring a civil RICO claim, must "misrepresentation" also be proven in addition to "scheme or artifice to defraud" despite the use of the disjunctive in the mail fraud statute?

LIST OF PARTIES

Petitioners are Jeanne Biggs and Charles Biggs, plaintiffs, who were also referred to below as Borrower No. 0124854613 and Mr. and Mrs. B.

Respondents are Countrywide Bank, N.A. and Eaglewood Mortgage LLC, defendants.

Maria Abreu is another homeowner whose motion to intervene as an additional plaintiff was denied.

Settlement Solutions, Aurora Loan Services LLC, Lehman Mortgage Capital, Lehman Brothers, Kevin Decker, Mike Sweeney, Donald Crowe and Michael A. Perry were defendants, dismissed pursuant to settlement agreements.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at *Biggs v. Eaglewood Mortg., LLC*, 2009 U.S. App. LEXIS 25944 (4th Cir. 2009). The Fourth Circuit affirmed the September 18, 2008 decision of the United States District Court for the District of Maryland, reported at *Biggs v. Eaglewood Mortg. LLC*, 582 F. Supp. 2d 707 (D. Md. 2008), as supplemented on January 5, 2009, reported at *Biggs v. Eaglewood Mortg. LLC*, 636 F. Supp. 2d 477 (D. Md. 2009). *See* Appendices A-D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Fourth Circuit's opinion was rendered on November 20, 2009. The Biggs' Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied on January 26, 2010. *See* Appendix D.

STATUTORY PROVISIONS INVOLVED

Title 18 United States Code, Section 1341

Frauds and swindles

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange,

alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. ***

Title 18 United States Code, Section 1961

Definitions

As used in this chapter –

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), . . .

Title 18 United States Code, Section 1962

Prohibited Activities

* * *

(c) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

Title 18 United States Code, Section 1964

Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

* * *

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.

* * *

STATEMENT OF THE CASE

1. Starting in 2004 and over the following years, Respondent Countrywide Bank, N.A. ("Countrywide") involved itself in widespread use, against homeowners, of a type of adjustable rate mortgage ("ARM") known as a "payment option ARM". Petitioners Jeanne and Charles Biggs, husband and wife who had bought their home in the 1950s, fell victim to Countrywide and its co-conspirators' use of payment option ARMs in violation of the "scheme and artifice" prong of the mail fraud statute.

Although now payment option ARMs and their use of initial teaser interest rates are notorious, back in the time period 2004 through 2007, a mortgage which had an Adjustable Rate Rider (e.g., SA13, SA34, SA57) which established a payment option ARM took in many victims. That Countrywide's own litigation attorneys and the

district judge would misconstrue payment option ARM terms and also whether payment option ARMs and ordinary ARMs both negatively amortize[1] (Appendix A, 8a-9a; Appendix C, 32a), demonstrates how insidious a payment option ARM can be.

In 2004, Countrywide and its co-conspirators used a payment option ARM (SA1-21) against the Biggses in violation of the scheme and artifice prong of the mail fraud statute. In 2006, Countrywide and Eaglewood used a different payment option ARM (SA22-41) against the Biggses in violation of the scheme and artifice prong of the mail fraud statute. In 2007, Eaglewood and its co-conspirators used another different payment option ARM (SA42-63) against the Biggses in violation of the scheme and artifice prong of the mail fraud statute.

2. Petitioners filed their Complaint on October 12, 2007. Respondent Countrywide filed its Motion to Dismiss, or in the Alternative, for Summary Judgment on January 22, 2008. The district court issued its Opinion on September 18, 2008 granting Countrywide's Motion in the form of summary judgment, along with an Order. Petitioners filed a motion for reconsideration, which the district court denied in its Supplemental Opinion dated January 5, 2009. Respondent Eaglewood filed its Motion for Summary Judgment on January 29, 2009, which

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1. Moreover, if a homeowner has a payment option ARM loan, negative amortization does not automatically always necessarily occur, and would not occur in some instances of a homeowner making certain payment choices. Countrywide's summary judgment motion was without evidence of the Biggses' actual payment history on the payment option ARMs.

the district court granted on April 13, 2009 in a Memorandum Opinion along with entry of a Final Order.

3. Petitioners filed their Notice of Appeal May 8, 2009. The Fourth Circuit's decision was entered on November 30, 2009. Petitioners timely filed a petition for reconsideration, which the Fourth Circuit denied on January 26, 2010.

REASONS FOR GRANTING THE PETITION

Whether a non-statutory "misrepresentation" requirement can be read into the mail fraud statute, 18 U.S.C. § 1341, or into the RICO statute in a case in which the predicate acts under 18 U.S.C. § 1962(c) are "scheme or artifice" mail fraud, is an important federal question. How the Fourth Circuit has decided this important federal question conflicts with this Court's jurisprudence and splits with other circuits. Whether victimized homeowners may proceed with a civil RICO claim based on "scheme or artifice" mail fraud without needing to prove "misrepresentation" is an important question of federal law that has not been, but should be, settled by this Court.

I. THE FOURTH CIRCUIT'S NON-STATUTORY "MISREPRESENTATION" REQUIREMENT IS IN CONFLICT WITH THIS COURT'S DECISIONS

The Fourth Circuit's reading a non-statutory "misrepresentation" requirement[2] into a civil RICO claim based on "scheme or artifice" mail fraud is in conflict with this Court's decisions on "scheme or artifice" mail fraud, and with this Court's decisions on the RICO statute.

A. Reading a "Misrepresentation" Requirement into "Scheme or Artifice" Mail Fraud is in Conflict with a Century of this Court's Decisions

The Fourth Circuit's reading a non-statutory "misrepresentation" requirement into "scheme or artifice" mail fraud is in conflict with *Durland v. United States*, 161 U.S. 306 (1896); *Public Clearing House v. Coyne*, 194 U.S. 497 (1904) (citing *Durland*); and *Cleveland v. United States*, 531 U.S. 12 (2000) (citing *Durland*).

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2. There is no "misrepresentation" requirement on the face of the civil RICO statute. Nor does the mail fraud statute on its face contain the "misrepresentation" requirement imposed by the Fourth Circuit. The mail fraud statute's respective "representations" prong and "scheme or artifice" prong are in the disjunctive. The express language of the mail fraud statute, the mail fraud statute's disjunctive nature, and the "scheme or artifice" prong went unaddressed in the Fourth Circuit's decision.

In 1896 when this Court decided *Durland*, the mail fraud statute (which had been enacted in 1872) expressly recited "scheme or artifice" but did not yet expressly recite the additional "representations" prong that is in today's mail fraud statute. In *Durland*, where the defendant "was trying to entrap the unwary, and to secure money from them on the faith of a scheme glittering and attractive in form, yet unreal and deceptive in fact, and known to him to be such", 161 U.S. at 312, this Court rejected the defendant's argument that a misrepresentation was needed, and ruled that the mail fraud statute (which then only included the "scheme or artifice" prong) "includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." *Id.* at 313.

In 1904, this Court in *Coyne* stated,

> the master found that there had been no false representations of existing facts and no unfair dealing with the cooperators; yet, as we held in *Durland v. United States*, 161 U.S. 306, the misrepresentation of existing facts is not necessary to a conviction under a statute applying to 'any scheme or artifice to defraud.'

194 U.S. at 516.

In 1909, Congress amended the mail fraud statute to codify the holding in *Durland* by adding the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises". The "scheme or artifice" language remained in the mail fraud statute.

In 2000, this Court in *Cleveland* summarized the history of "scheme and artifice" mail fraud as follows:

> As first enacted in 1872, § 1341 proscribed the use of the mails to further "'any scheme or artifice to defraud.'"*** In 1896, this Court held in *Durland v. United States*, 161 U.S. 306, 313, 40 L. Ed. 709, 16 S. Ct. 508, that the statute covered fraud not only by "representations as to the past or present," but also "suggestions and promises as to the future." In 1909, Congress amended § 1341 to add after "any scheme or artifice to defraud" the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *McNally*, 483 U.S. at 357. We explained in *McNally* that the 1909 amendment "codified the holding of *Durland*," *id.* at 357, and "simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property," *id.* at 359.

531 U.S. at 19. Thus, this Court's decisions for over a century preclude reading a "misrepresentation" requirement into "scheme or artifice" mail fraud.

B. Reading a Non-statutory Requirement into the RICO Statute is in Conflict with This Court's Decisions

The Fourth Circuit's decision (Appendix A) reading a non-statutory requirement into the RICO statute conflicts with *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008) (declining to read a first-party reliance requirement into the civil RICO statute, and "hold[ing] that a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations"); *Boyle v. United States*, __ U.S. __, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009) (stopping with the clear statutory language of the RICO statute, and refusing to consider RICO's statutory purpose or legislative history to narrow the statute); *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 252 (1994) (rejecting the argument that "RICO requires proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose"); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 244 (1989) (declining to read "an organized crime limitation into RICO's pattern concept"); *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 481 (1985) (rejecting the view that RICO provides a private right of action "only against defendants who had been convicted on criminal charges, and only where there had occurred a 'racketeering injury'"). Thus, this Court's decisions preclude reading a non-statutory "misrepresentation" requirement into a civil RICO claim based on "scheme or artifice" mail fraud.

II. THE FOURTH CIRCUIT'S NON-STATUTORY "MISREPRESENTATION" REQUIREMENT IS IN A DIFFERENT DIRECTION THAN OTHER CIRCUITS

The Fourth Circuit's decision (Appendix A) reading a non-statutory "misrepresentation" requirement into the mail fraud statute and/or the RICO statute is in a different direction than the Third, Ninth, Tenth and Eleventh Circuits which do not read-in a non-statutory "misrepresentation" requirement. *See Kolar v. Preferred Real Estate Investments, Inc.*, 2010 U.S. App. LEXIS 702 at *19 (3rd Cir. 2010) ("scheme need not involve affirmative misrepresentation"); *United States v. Woods*, 335 F.3d 993, 998 (9th Cir.), *cert. denied*, 540 U.S. 1025 (2003); *United States v. Gallant*, 537 F.3d 1202, 1228 (10th Cir. 2008), *cert. denied*, __ U.S. __, 129 S. Ct. 2026 (2009); *United States v. Lefebvre*, 2006 U.S. App. LEXIS 18857 n.2 (10th Cir. 2006); *United States v. Kennedy*, 64 F.3d 1465, 1476 (10th Cir. 1995); *American United Life Ins. Co.*, 480 F.3d 1043, *reh'g, en banc, denied*, 2007 U.S. App. LEXIS 30371 (11th Cir.), *cert. denied*, 552 U.S. 990 (2007). Thus, certiorari is warranted to resolve a split between the Fourth Circuit and other circuits as to whether to read a non-statutory "misrepresentation" requirement into the mail fraud statute or the RICO statute.

III. WITH THE NATURE OF A RESIDENTIAL MORTGAGE, THE MANY PAYMENT OPTION ARM VICTIMS, AND THE ONGOING FORECLOSURE CRISIS, REVIEW IS PARTICULARLY WARRANTED

Review is particularly warranted where this RICO matter concerns residential mortgages. Such mortgages are long-term (30 years or more) obligations, and for most owner-occupiers, usually the largest lifetime transaction to date in dollar terms. When homeowners are victimized by a mortgage-based RICO violation, the harm to their family finances is deep, and can be multi-generational. When homeowners are thus victimized, others – such as nearby property owners, communities, and tax-collecting entities – are likely to suffer consequences.

Review further is warranted because many homeowners are affected. By way of example, from 2004 to 2008, Countrywide was using payment option ARMs on a scale at least in the tens of billions of dollars,[3] so that many people – including those with active Countrywide "legacy" loans now within Bank of America's purview as well as other victims who are no

3. *See* Countrywide's annual 10-K filings for 2004-2007, at http://www.sec.gov/Archives/edgar/data/25191/000095012905002432/v05932e10vk.htm (pages 40-41); http://www.sec.gov/Archives/edgar/data/25191/000110465906012770/a06-2962_110k.htm (pages 41, 57); http://www.sec.gov/Archives/edgar/data/25191/000110465907015136/a07-4926_110k.htm (page 64); http://www.sec.gov/Archives/edgar/data/25191/000104746908002104/a2182824z10-k.htm (pages 122-123).

longer in an active Countrywide payment option ARM loan – are affected. *See also Leyvas v. Bank of Am. Corp. (In re: Countrywide Fin. Corp. Mortg. Mktg. and Sales Practice Litig.)*, 601 F. Supp. 2d 1201 (S.D. Calif. 2009). Also, others, who are not parties herein, used payment option ARMs against homeowners. *See, e.g., Payan v. Greenpoint Mortgage Funding, Inc.*, 2010 U.S. Dist. LEXIS 668, at *23 (D. N.J. 2010); *Rush v. American Home Mortgage, Inc.*, 2009 U.S. Dist. LEXIS 112530 (D. Md. 2009); *Winter v. Chevy Chase Bank*, 2009 U.S. Dist. LEXIS 99554 (N.D. Calif. 2009); *Nkengfack v. Homecomings Financial LLC*, 2009 U.S. Dist. LEXIS 50792 (D. Md. 2009); *Valenzuela v. American Home Mortgage Investment Trust 2005-2*, 2009 U.S. Dist. LEXIS 31111 (E.D. Calif. 2009); *In re Wachovia Corp. "Pick-a-payment" Mortg. Mktg. and Sales Practice Litig.*, 598 F. Supp. 2d 1383 (J.P.M.L. 2009); *Mincey v. World Sav. Bank, FSB*, 614 F. Supp. 2d 610 (D. S.C. 2008); *Brewer v. Indymac Bank*, 2008 U.S. Dist. LEXIS 73202 (E.D. Calif. 2008); *Cavin v. Home Loan Center, Inc.*, 469 F. Supp. 2d 561 (N.D. Ill. 2007).

Additionally, review is warranted because of the ongoing residential mortgage foreclosure crisis in the United States.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED NOVEMBER 30, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1545

JEANNE BIGGS; CHARLES BIGGS,

Plaintiffs - Appellants,

and

BORROWER NO. 0124854613, Mr. and Mrs. B.,

Plaintiff,

v.

EAGLEWOOD MORTGAGE, LLC;
COUNTRYWIDE BANK, N.A.,

Defendants - Appellees,

MARIA ABREU,

Movant,

Appendix A

and

SETTLEMENT SOLUTIONS; AURORA LOAN SERVICES LLC; LEHMAN MORTGAGE CAPITAL; LEHMAN BROTHERS; KEVIN DECKER; MIKE SWEENEY; DONALD CROWE; MICHAEL A. PERRY,

Defendants.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Peter J. Messitte, Senior District Judge. (8:07-cv-02768-PJM)

Submitted: November 2, 2009
Decided: November 30, 2009

Before WILKINSON, NIEMEYER , and DUNCAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

PER CURIAM:

Jeanne and Charles Biggs ("the Biggses") appeal the district court's order granting summary judgment to Appellees Countrywide Bank FSB and Eaglewood Mortgage, LLC, (collectively "Appellees") on the Biggses' action under the civil RICO statute, 18 U.S.C. § 1964 (2006). On appeal, the Biggses assert that the district court erred in applying a reliance element to their claims of mail fraud; determining the Biggses had

prior knowledge of the possibility of negative amortization; failing to view the facts in the light most favorable to the Biggses; and improperly deciding questions of the Biggses' knowledge and reliance. We affirm.

We review de novo a district court's order granting summary judgment and view the facts in the light most favorable to the nonmoving party. *Bogart v. Chapell*, 396 F.3d 548, 555 (4th Cir. 2005). Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Bogart*, 396 F.3d at 555. Summary judgment will be granted unless a reasonable jury could return a verdict for the nonmoving party on the evidence presented. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

I. Reliance

RICO provides a private right of action and treble damages for "[a]ny person injured in his business or property by reason of a violation of section 1962" of the RICO's criminal component. 18 U.S.C. § 1964(c) (2006). Section 1962 contains RICO's criminal prohibitions; pursuant to 18 U.S.C. § 1962(c), it is

> "[U]nlawful for any person employed by or associated with" an enterprise engaged in or affecting interstate or foreign commerce "to conduct or participate, directly or

> indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." The term "racketeering activity" is defined to include a host of so-called predicate acts, including "any act which is indictable under . . . section 1341 (relating to mail fraud)."

Bridge v. Phoenix Bond & Indemnity Co., 128 S. Ct. 2131, 2137-38 (2008) (quoting 18 U.S.C. §§ 1961(1)(B), 1962(c) (2006)). Mail fraud occurs when an individual, having devised a plot to defraud, uses the mail in order to further their plot. 18 U.S.C. § 1341 (2006). "The gravamen of the offense is the scheme to defraud, and any mailing that is incident to an essential part of the scheme satisfies the mailing element, even if the mailing itself contains no false information." *Bridge*, 128 S. Ct. at 2138. Thus, RICO allows for a private civil action to any individual injured through a pattern of conduct constituting mail fraud.

On appeal, the Biggses assert that the district court erred in requiring them to prove reliance on Countrywide's alleged mail fraud. The Biggses contend this requirement contravenes the Supreme Court's recent decision in *Bridge*. This court reviews such questions of statutory interpretation de novo. *See United States v. Pierce*, 278 F.3d 282, 286 (4th Cir. 2002).

In *Bridge*, the Supreme Court held that "no showing of reliance is required to establish that a person has violated § 1962(c) by conducting the affairs of an

enterprise through a pattern of racketeering activity consisting of acts of mail fraud." *Bridge,* 128 S. Ct at 2139. Though the Supreme Court noted that a plaintiff would generally be unable to demonstrate causation without showing at least some form of reliance, "the fact that proof of reliance is often used to prove an element of the plaintiff's cause of action . . . does not transform reliance itself into an element of the cause of action." *Id.* at 2144.

Though the district court was correct in determining that the instant situation was somewhat different from the facts in *Bridge,* it nevertheless erred by finding that "*Bridge* did not eliminate reliance as an element of a RICO claim predicated on mail fraud." In so holding, the district court improperly distinguished *Bridge* from the instant case by citing to footnotes and other dicta in which the Supreme Court expressed its view that it would be challenging to demonstrate proximate cause without also proving some kind of reliance. *See, e.g., Bridge,* 128 S. Ct. at 2143 n.6 ("Of course, a misrepresentation can cause harm only if a recipient of the misrepresentation relies on it), *Id.* at 2144 ("Of course, none of this is to say that a RICO plaintiff who alleges injury by reason of a pattern of mail fraud can prevail without showing that *someone* relied on the defendant's misrepresentations") (internal quotation marks and citations omitted). Based on this language, the district court found that *Bridge's* holding was limited to cases of third-party reliance.

However, contrary to the finding of the district court, such statements do not restrict *Bridge's* holding. Though *Bridge* concerned a plaintiff who had been harmed by a third-party's reliance on the defendant's misrepresentations, we do not read its holding as limited to this particular situation. The Supreme Court explained that, though common law fraud required a showing of reliance, "[n]othing on the face of the relevant statutory provisions imposes such a requirement." *Bridge,* 128 S. Ct. at 2138. Instead, using the mail in furtherance of a scheme to defraud is a predicate act of racketeering under RICO, even if there is no reliance on the misrepresentation. *Id.* If the defendant has engaged in a pattern of such behavior, he will be liable under RICO, without anyone actually relying on a fraudulent misrepresentation. *Id.* Therefore, we agree with the Biggses that *Bridge's* holding eliminates the requirement that a plaintiff prove reliance in order to prove a violation of RICO predicated on mail fraud.

However, we may affirm a district court's grant of summary judgment on any legal basis supported by the record; we need not rely upon the grounds asserted by the district court. *See Bryant v. Bell Atl. Md., Inc.,* 288 F.3d 124, 132 (4th Cir. 2002). Therefore, despite this error by the district court, we affirm the district court's grant of summary judgment to Countrywide, as the Biggses failed to prove, or even allege, any fraudulent behavior on the part of Countrywide or Eaglewood. The Biggses allege three different purportedly fraudulent actions on the part of the Defendants:

Appendix A

> Existing homeowners were re-financed with payment option adjustable rate mortgage loans that were at least one of the following: unsuitable for the homeowner; less suitable than at least one other financing approach available to the homeowner; more costly to the homeowner than at least one other suitable financing approach available to the homeowner with the additional cost inuring to the benefit of the enterprise or a member or members thereof.

In support of these conclusory allegations, the Biggses repeatedly state that the Defendants failed to tell them that "a fixed rate mortgage . . . was more suitable for [the Biggses] than [a] . . . payment option ARM." Additionally, the Biggses contend that the Defendants utilized various agents in order to "cloak the . . . payment option ARM with seeming legitimacy and safety," making various statements to the Biggses about how a payment option ARM would benefit them.

However, despite these allegations, the Biggses still fail to demonstrate, or even allege, that they were misled about any particular loan term. The adjustable rate rider of each payment option ARM explicitly delineated the schedule for changes in the interest rate and the monthly payment amount, as well as the possibility of negative amortization. As noted by the district court, the Biggses were "active and continuous shoppers of mortgage financing" and "possessed obvious and extensive experience with both fixed-rate loans and

ARM loans" as evidenced by the fact that, beginning in 2003, the Biggses refinanced their mortgage five times in a span of four years. This familiarity with multiple loan types, combined with the fact that each loan complained of explicitly put the Biggses on notice of the possibility of negative amortization, supports our conclusion that the district court did not err in granting summary judgment for the Defendants.

II. Other Issues

Next, the Biggses contend that the district court "wrongly construed the 1997 mortgage as negatively amortizing." In effect, the Biggses argue that this improper construction led the district court to incorrectly determine that the Biggses understood the principle of negative amortization. However, as explained above, the possibility of negative amortization was explicitly delineated in the adjustable rate rider to each of the payment option ARMs of which the Biggses now complain. Therefore, regardless of whether the Biggses' 1997 mortgage had the possibility for negative amortization, the Biggses were made aware of this possibility before entering into each of the ARM mortgages with Countrywide.

The Biggses also assert that "the district court erred by [fail]ing to identify reasonable inferences in Homeowner's favor." It appears that the Biggses assign error to the district court's conclusion that they were experienced mortgage shoppers, as well as Countrywide's alleged mischaracterization in its

pleadings of the 2004 loan as having an interest rate of 4.269 percent for the length of the loan. However, as previously explained, the fact that the Biggses refinanced their mortgage five times in a span of four years strongly supports a finding that the Biggses understood the terms of the mortgages, and were not innocent "victims" of a fraud scheme. Additionally, though Countrywide appears to have mischaracterized the 2004 mortgage as having a lifetime interest rate of 4.269 in its memorandum in support of its motion to dismiss, the Biggses fail to demonstrate how this error in the pleadings had any bearing whatsoever on whether the Biggses understood the mortgages into which they entered.* Therefore, these contentions are without merit.

Finally, the Biggses assert that the district court erred in improperly deciding questions of "knowledge and reliance" when considering the Biggses' claims of fraud and negligent misrepresentation, incorrectly relying on "Countrywide's interpretation of what the

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* Moreover, any such error is clearly the product of a clerical error and not evidence of Countrywide's deceit or own misunderstanding of its loans. In the pleadings, Countrywide incorrectly described the loan as having an interest rate of 4.269 percent, when in actuality this was the calculated APR of the loan appearing in the Truth-in-Lending-Disclosure-Statement ("TILDS"). The initial interest rate was 1.750 percent, adjusted monthly. This discrepancy is clearly explained in the "Definition" section of the TILDS, which states that the interest rate found in the rider is but one of several charges included in the APR, which results in an APR higher than the interest rate shown in the rider.

undisputed evidence of record shows." This contention is also without merit. The Biggses' amended complaint is bereft of a single allegation of purposeful misrepresentation or reliance thereon. Moreover, as we have described, all the pertinent information regarding the loans, their adjustable interest rates, and the possibility of negative amortization was disclosed to the Biggses in the form of detailed adjustable rate riders. The Biggses initialed each page of the adjustable rate rider for the first loan indicating their review of it, and the Biggses signed the final page of each of the three riders, each time indicating that they accepted and agreed to the terms delineated in the rider. Accordingly, because the Biggses fail to present any evidence, or even raise any serious possibility, of misrepresentation or their reliance thereon, we find that the district court correctly granted summary judgment as to their claims.

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B — SUPPLEMENTAL OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED JANUARY 5, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. **PJM 07-2768**

JEANNE BIGGS, *et al.*,

Plaintiffs,

v.

EAGLEWOOD MORTGAGE LLC, *et al.*,

Defendants.

SUPPLEMENTAL OPINION

Plaintiffs Jeanne and Charles Biggs ("the Biggs") allege that Defendants Eaglewood Mortgage, LLC and Countrywide Bank N.A.,[1] individually and as co-conspirators, engaged in a mortgage scheme with the intent to defraud them. After Countrywide filed a Motion to Dismiss or, in the Alternative, for Summary Judgment as to all claims, the Biggs filed motions seeking summary judgment in their favor on their

1. Since this litigation began, Countrywide has been taken over by Bank of America. For the sake of convenience, Countrywide will continue to be referred to as "Countrywide."

racketeering and conversion claims. On September 17, 2008, the Court issued an Opinion and Order granting in part and mooting in part Countrywide's Motion to Dismiss; granting in part and mooting in part its Motion for Summary Judgment; and denying the Biggs' Cross-Motions for Summary Judgment. The Biggs have now filed a Motion to Alter/Amendment Judgment under Federal Rule of Civil Procedure 59(e). For the following reasons, the Motion is **DENIED**.

I.

In their Amended Complaint, the Biggs asserted that in 2004, Countrywide, through its agents and/or co-conspirators, made false statements to induce them to execute loan documents converting their 5.25% fixed-rate home mortgage with Chase Manhattan Mortgage Corporation into a payment option adjustable rate mortgage ("ARM") with Countrywide, and that in 2006 Countrywide induced them to refinance through yet another payment option ARM.[2] The Biggs claimed that these payment option ARMs contained various high risk features which were inappropriate for them, an elderly retired couple. They further alleged that, by offering loans with these features, Defendants intended the Biggs' loan principal to increase substantially over time, at which time they would either be in default and subject to foreclosure or, if they could afford the inflated payment, their modest monthly income would be depleted.

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2. A full recitation of the facts of the case is set forth in the Court's prior Opinion. *See Biggs v. Eaglewood Mortgage LLC*, 582 F. Supp. 2d 707, 2008 WL 4702662 (D. Md. 2008).

Against this background, the Biggs submitted that Countrywide was liable to them for compensatory and punitive damages based on several causes of action. The Court, however, granted Countrywide's Motion for Summary Judgment as to Count I, and its Motion to Dismiss as to Counts II, III, IV, V and VI. The Court dismissed Count VII *sua sponte*. Only Count I-Violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq.* remains and only as applied to Eaglewood Mortgage, LLC.

II.

The Court considers the Biggs' Motion to Alter/Amend Judgment pursuant to Federal Rule of Civil Procedure 59(e).[3] The Biggs allege that the Court improperly granted Countrywide's Motion for Summary Judgment as to Count I based on its mistaken view that the Biggs were required to prove reliance as an element of their claim. They argue that under the Supreme Court's decision in *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008), reliance is no longer a required element in a RICO claim predicated on mail fraud. Therefore, they say, the Court's ruling needs to be amended to comport with *Bridge*. Further, they claim that the Court, in disposing of Counts I, III, IV and V, improperly resolved questions of fact against them in violation of the summary judgment standard requiring resolution of all facts in favor of the non-moving party.

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3. Because the court did not enter judgment in its earlier ruling, the Motion is timely filed.

Countrywide, in response, argues that *Bridge* did not eliminate the reliance element in a RICO case predicated on mail fraud; it simply eliminated first-party reliance requirement in cases where a third party was affected by the fraud. Consequently, Countrywide argues that *Bridge* does not contradict the Court's finding that Countrywide was entitled to summary judgment as to Count I because the Biggs, as a matter of law, failed to prove the necessary element of reliance. As to the remaining counts, Countrywide argues that the Court did not base its Opinion on improper inferences and that the record clearly supports the Court's conclusions.

III.

The Court agrees with Countrywide that *Bridge* did not eliminate reliance as an element of a RICO claim predicated on mail fraud. The Supreme Court was presented with a situation where the plaintiffs themselves had not received or relied upon misrepresentations made by defendants, but had relied on misrepresentations defendants made to others. *See Bridge*, 128 S.Ct. at 2139. What the Court held was that, even though plaintiffs had not themselves relied on the misrepresentations made by defendants, they properly asserted a claim because first-party reliance is not a required element of a RICO claim predicated on mail fraud. *See Id.* at 2145. The Court was careful to note, however, that "none of this is to say that a RICO plaintiff who alleges injury by reason of a pattern of mail fraud can prevail without showing that *someone* relied on the defendant's misrepresentations." *Id.* at 2144 (internal quotations omitted). The Court stressed that a misrepresentation cannot cause harm unless

it is relied upon. *Id.* at 2143, fn 6 ("Of course, a misrepresentation can cause harm only if a recipient of the misrepresentation relies on it.").

The present case is therefore clearly distinguishable from *Bridge*, because here the Biggs claim that Countrywide directly misled them and that they, in fact, relied on those misrepresentations. *See* Amended Complaint at ¶¶ 30, 40, 51, 52, 74, 84 & 130.

Other courts examining this issue since *Bridge* are in accord, holding that where plaintiffs allege their own first-party reliance in a RICO case predicated on mail fraud, reliance must still be proven as an element of the claim. *See e.g. Dungan v. Academy at Ivy Ridge*, No. 06-CV-0908, 2008 U.S. Dist. LEXIS 56757, 2008 WL 2827713 at *3 (N.D.N.Y. July 21, 2008) ("While this Court acknowledges the rule enunciated in *Bridge*, the problem for Plaintiffs is that they do allege that they relied on Defendant's claimed misrepresentations and that it was this first-person reliance that caused them to sustain damages . . . [a]ccordingly, reliance continues to be a predominant issue . . ."); *G&G TIC, LLC v. Alabama Controls, Inc.*, No. 4:07-CV-162, 2008 U.S. Dist. LEXIS 75269, 2008 WL 4457876 at *4 (M.D. Ga. Sept. 29, 2008) (in granting motion to dismiss RICO counts based on mail and wire fraud, the court stated that while *Bridge* eliminated the first party reliance requirement, the plaintiff must still show that "it was injured as a direct result of the fraud" and that "someone relied upon a misrepresentation made by the defendants and that the reliance directly caused harm to the plaintiff.").

This Court previously found, given the undeniable facts in this case, that the Biggs failed to raise a genuine issue of material fact that they relied to their detriment on any representation made by Countrywide. Since *Bridge* did not eliminate the necessity of proving reliance in a situation where parties allege, as part of a RICO case predicated on mail fraud, that they personally relied upon purported misrepresentations, the Court properly granted Countrywide's Motion for Summary Judgment as to this issue.

IV.

As to the remaining arguments that the Court improperly relied on factual inferences in resolving Counts I, III, IV and V in favor of Countrywide, the Biggs fail to point to any mistake or new information which would necessitate amending the Court's prior Order. The Court is satisfied that its rationale in ruling upon those Counts remains intact.

V.

For the foregoing reasons, the Court **DENIES** the Biggs' Motion to Alter/Amend Judgment.

A separate order will **ISSUE**.

/s/
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

January 5, 2009

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND FILED SEPTEMBER 18, 2008

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. PJM 07-2768

JEANNE BIGGS, *et al.*,

Plaintiffs,

v.

EAGLEWOOD MORTGAGE LLC, *et al.*,

Defendants.

OPINION

Plaintiffs Jeanne and Charles Biggs ("the Biggs") allege that Defendants Eaglewood Mortgage, LLC and Countrywide Bank N.A.,[1] individually and as co-conspirators, engaged in a mortgage scheme with the intent to defraud them. Countrywide has filed a Motion to Dismiss or, in the Alternative, for Summary Judgment as to all claims. In addition to opposing Countrywide's Motions, the Biggs have filed motions seeking summary judgment in their favor on their racketeering and

1. Since this litigation began, Countrywide has been taken over by Bank of America. For the sake of convenience, Countrywide will continue to be referred to as "Countrywide."

conversion claims.[2] For the following reasons, Countrywide's Motion to Dismiss is **GRANTED IN PART** and **MOOTED IN PART**; its Motion for Summary Judgment is **GRANTED IN PART** and **MOOTED IN PART**; and the Biggs' Cross-Motions for Summary Judgment are **DENIED**.

I.

In their Amended Complaint, the Biggs assert that in 2004 Countrywide, through its agents and/or co-conspirators, made false statements to induce them to execute loan documents converting their 5.25% fixed-rate home mortgage with Chase Manhattan Mortgage Corporation into a payment option adjustable rate mortgage ("ARM")[3] with Countrywide, and in 2006 induced them to refinance through yet another payment

2. After Countrywide's Motion was fully briefed and argued, the Biggs filed the motions requesting judgment in their favor on the racketeering and conversion claims. Such requests should have been made in the form of Cross-Motions for Summary Judgment at the time the Biggs filed their opposition to Countrywide's Motion. The Court, in any case, will refer to the Biggs' requests as Cross-Motions for Summary Judgment as to the racketeering and conversion claims.

3. A payment-option adjustable rate mortgage — also known as a flexible-payment ARM, pay-option ARM, option ARM, or PO — is considered nontraditional in that it allows the borrower to choose from a number of payment options. For example, the borrower may choose either a minimum payment option each month based on an introductory interest rate, an IO [interest only] (Cont'd)

option ARM with Countrywide.[4] The Biggs claim that these payment option ARMs contained various high risk

(Cont'd)

> payment option based on the fully indexed interest rate, or a fully amortizing principal-and-interest payment option based on a 15- or 30 year loan term plus any required escrow payments. The minimum payment option can be less than the interest accruing on the loan, resolution [*sic* — "resulting"?] in negative amortization. The IO option avoids negative amortization but does not allow principal amortization. After a certain number of years, or if the loan reaches a certain negative amortization cap, the required monthly payment amount is refigured to require payments that will fully amortize the outstanding balance over the remaining loan term.

Glossary, Community Investments Online, Vol. 18 No. 3 (December 2006), http://www.frbsf.org/publications/community/investments/0612/glossary.pdf, (last visited Sept. 16, 2008).

4. The Biggs also allege that in 2007, as part of Defendants' ongoing "scheme," they were induced to agree to a third payment option ARM, this time with American Home Mortgage or, in the alternative, that they were forced to refinance and accept the American Home Mortgage ARM because of the unfavorable transactions with Countrywide in 2004 and 2006. Countrywide received a pay-off of its 2006 payment option ARM out of the proceeds of the 2007 ARM with American Home Mortgage.

American Home Mortgage, which filed for bankruptcy before this suit was filed, is not a party to the suit.

The Biggs' claim as to its 2007 ARM with American Home Mortgage (AHM) is beyond any relief the Court could award as the case presently stands, given that AHM is not a party to this

(Cont'd)

features, including an initial "teaser" interest rate, abruptly changing interest rates, negative amortization, and prepayment penalties, all of which were inappropriate for the Biggs, an elderly retired couple, Charles Biggs being 82 years of age and Jeanne Biggs 79 years of age as of the date suit was filed. The Biggs further allege that, by offering loans with these features, Defendants intended the Biggs' loan principal to increase substantially over time until the adjustable rate would kick in and their required monthly payment would increase substantially, at which time the Biggs would either be in default and be subject to foreclosure or, if they could afford the inflated payment, their modest monthly income would be depleted. According to the Biggs, any chance of refinancing the increased principal balance and prepayment penalties into a fixed-rate mortgage at that juncture would most likely prove impossible, since the requisite 80% loan-to-value ratio for a fixed rate loan could not then be met.

Against this background, the Biggs submit that Countrywide is liable to them for compensatory and

(Cont'd)

suit. Among their prayers for relief, the Biggs ask the Court to hold the AHM mortgage unenforceable. But even if AHM were shown to be an agent or co-conspirator of Countrywide — and there is absolutely no evidence other than pure assertion by the Biggs that this is so apart from the fact that AHM and Countrywide have apparently done business together on several occasions — AHM would certainly be a necessary party to this litigation before the Court could make any declaration as to the enforceability *vel non* of the AHM loan. The fact of AHM's absence from the suit alone makes any consideration of that issue inappropriate.

punitive damages based on one or more of the following causes of action: Count I — Violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq.*; Count II — Conversion; Count III — Conspiracy; Count IV — Fraud or Fraudulent Misrepresentation; Count V — Negligent Misrepresentation; Count VI — Negligence; and Count VII — Punitive Damages.[5]

II.

A. A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint. *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). The court must consider all well-pled allegations in the complaint as true and must construe all factual allegations in the light most favorable to the plaintiff. *See Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783 (4th Cir. 1999). The court, however, need not accept conclusory factual allegations devoid of any reference to an actual event, *United Black Firefighters v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979),

5. There is no separate cause of action for punitive damages apart from an underlying cause of action upon which punitive damages can be grounded. This is true both as a matter of federal law, *see e.g. Green v. H & R Block*, 981 F. Supp. 951 (D. Md. 1997), and state law, *e.g. Exxon Corp. v. Yarema*, 69 Md. App. 124, 516 A.2d 990 (Md. Ct. Spec. App. 1986). Although Countrywide has not raised the issue in its Motion, the Court will *sua sponte* dismiss Count VII. Since, as will be seen, no underlying causes of action survive Countrywide's Motion, it would be academic to discuss the re-pleadability of punitive damages.

unsupported legal allegations, *Revene v. Charles County Comm'rs*, 882 F.2d 870, 873 (4th Cir. 1989), or legal conclusions couched as factual allegations, *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986). To survive a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level" and the facts must suffice to "state a claim to relief that is plausible on its face." *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965, 1974, 167 L. Ed. 2d 929 (2007).

B. Assuming a cognizable cause of action is stated, a party will be entitled to summary judgment if the evidence in the record "show[s] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The court is obligated to view the facts and inferences drawn from the facts in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). "'A mere scintilla of evidence is not enough to create a fact issue.'" *Barwick v. Celotex Corp.*, 736 F.2d 946, 958-59 (4th Cir. 1984) (quoting *Seago v. N.C. Theatres, Inc.*, 42 F.R.D. 627, 640 (E.D. N.C. 1966), *aff'd*, 388 F.2d 987 (4th Cir. 1967)). There must be "sufficient evidence favoring the nonmoving party for a jury to

return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (citations omitted). A motion for summary judgment may be made by a defending party with or without supporting affidavits and documents, Fed. R. Civ. P. 56(b), but when the motion is properly made and supported, the plaintiff may not merely rely on allegations or denials in his or her own pleadings; he or she must respond with affidavits or other evidence. *Id.* at (e)(2).

III.

In Count I of the Amended Complaint, the Biggs assert a claim under the federal RICO statute, which establishes civil liability on the part of those who engage in a pattern of racketeering activities causing harm to another's business or property. *See* 18 U.S.C. §§ 1962, 1964. Violation of § 18 U.S.C. 1962 requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. *See Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). Under the statute, "a pattern of racketeering activity" requires, at a minimum, two predicate acts within a ten year period, while "racketeering activity" is defined in terms of a number of specific crimes, one of which is mail fraud. *See* 18 U.S.C. §§ 1961(1) and (5).

The Biggs allege that in July 2004 Countrywide formed an enterprise with Mortgage Equity Lenders

and Equitable Settlement Services, LLC, which later included American Home Mortgage, Eaglewood Mortgage, LLC, and Settlement Solutions, to engage in a fraudulent mortgage scheme, and that Countrywide, through its agents or co-conspirators, used the United States Postal Service to transmit loan coupons, thank you cards, loan documents, executed agreements, and other mail in the course of and for the purpose of executing the alleged fraudulent scheme. This scheme allegedly occurred over a number of years and included placement of the Biggs into payment option ARMs in 2004 and 2006 with Countrywide. The Biggs submit that Countrywide has engaged in similar conduct in various parts of the country, fraudulently placing other homeowners into payment option ARMs with high risk features for which those homeowners were not suited.

Countrywide argues that because payment option ARMs are not inherently illegal, absent evidence of other fraudulent conduct the Biggs' mortgage transactions cannot constitute "racketeering activity" within the meaning of RICO. In any case, says Countrywide, the Biggs were hardly naive as to the various mortgage options available to them, since they have held twelve mortgages with at least ten different lenders over the years and, with respect to the 2006 transaction, as evidenced by the high number of credit inquiries on their credit report, they were in fact extraordinarily active shoppers for the best refinancing option available. Countrywide also argues that the Biggs' loan documents clearly identified the terms of

the 2006 payment option ARM, including the so-called "risky" features with which the Biggs now take issue and that the documents it provided were in full compliance with the disclosure requirements of the federal Truth in Lending Act. 15 U.S.C. § 1601 *et seq.* In sum, says Countrywide, the mortgage transaction documents evidence no fraud and the Biggs have otherwise failed to proffer any other evidence of fraudulent representations attributable to it.

The first question in connection with Count I, taking their pleaded facts as true, is whether the Biggs have stated a RICO claim, *i.e.* is the count is subject to dismissal under Fed. R. Civ. P. 12(b)(6)? The issue, of course, is not whether the use of the U.S. mails can result in "racketeering activity" under RICO — certainly it can — the critical inquiry is whether the mails have been used to perpetrate a fraud.

The Biggs' theory of fraud is vague at best. Combing through the Amended Complaint and reviewing the transcript of oral argument, it appears that the Biggs are contending variously that payment option ARMS are fraudulent in general, and/or that the particular payment option ARMs in this case were fraudulent, and/or that such ARMS are fraudulent in general as to elderly persons of modest means, and/or that they were fraudulent as to the elderly Plaintiffs in this case. Whatever the precise theory, the illegality purportedly lies in the fact that payment option ARMS are part of a hard-sell on the part of banks, the high risk features of payment option ARMS are difficult to understand, and

over time — in marked contrast to fixed rate mortgages — they are inordinately costly. The Biggs suggest that the difficulty in understanding payment option ARMs is compounded by the fact that in this case their loan disclosure documents appear to contain conflicting statements of precisely what payments were due from them and when.

Countrywide submits that payment option ARMs are not inherently illegal or wrongful, hence simply providing them cannot constitute a "racketeering activity" within the meaning of RICO. No case, according to Countrywide, has so held. *See e.g. Rosenberg v. Wash. Mut. Bank*, 369 N.J. Super. 456, 849 A.2d 566, 573 (N.J. Super. Ct. App. Div. 2004) (finding that language of mortgage documents pertaining to a payment option ARM that included negative amortization was "complex, but not indecipherably so," and that "there was nothing misleading or nondisclosed on the loan statement."); *Cavin v. Home Loan Center, Inc.*, 469 F.Supp.2d 561 (N.D. Ill. 2007) (finding in the context of pre-approved mortgage offers that low teaser rates, pay options and negative amortization features were not deceptive). On the other hand, the Court notes that the Attorneys General of California and Florida have filed actions against Countrywide containing allegations not unlike those in the suit at bar, including that certain of Countrywide's lending practices have been designed to maximize company profits and entice borrowers with "teaser rates" while misrepresenting the substantially larger payments that come due later. *See e.g.* Complaint, *The People of the State of Illinois v. Countrywide Fin.*

Corp., et al, No. 08-CH-22994 (Ill. Cir. Ct. Cook County June 25, 2008), in which the Attorney General for the State of Illinois alleges that from at least the year 2000 until the present Countrywide has aggressively marketed and offered reduced documentation loans and adjustable rate products including those with high risk features such as an initial "teaser" rate, prepayment penalties, and negative amortization and that Countrywide has enticed borrowers into loans with such features by failing to make clear and conspicuous disclosures of the products' risks. *See also* Martha Neil, *Another AG Sues Countrywide*, ABA Journal, July 1, 2008, http://www.abajournal.com/news/another_ag_sues_countrywide (last visited July 2, 2008).

The foregoing actions, however, appear to have been brought under state consumer protection laws and not the federal RICO statute which, as Countrywide points out, is not a cause of action to be pled lightly. As the Fourth Circuit has "repeatedly noted, RICO actions require a continuous pattern of serious criminal activity: "RICO treatment is reserved for conduct 'whose scope and persistence pose a special threat to social well-being.'" *GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 551 (4th Cir. 2001), quoting *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir. 1989). RICO was not designed for, and cannot be applied to, "ordinary claims of fraud." *Int'l Data Bank, LTD v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987). *See also Market Products Mgmt, LLC v. Healthandbeautydirect.com, Inc.*, 333 F. Supp. 2d 418, 425 (D. Md. 2004), quoting *Al-Abood v. El-Shamari*, 217 F.3d 225, 238 (4th Cir. 2000).

(The "Fourth Circuit has been particularly cautious 'about basing a RICO claim on predicate acts of mail and wire fraud. . .'").

The Court agrees with Countrywide that fashioning a RICO claim out of the provision of payment option ARMS — whether to homeowners in general or to elderly homeowners of modest means in general or to the Biggs in particular — is highly problematic. But whether or not payment option ARMS can be deemed misleading in general or in specific cases and even assuming that a continuous pattern of misrepresentation relative to payment option ARMS on the part of Countrywide could be demonstrated, the Biggs' case clearly founders on the element of reliance. *See Chisolm v. TranSouth Fin. Corp.*., 95 F.3d 331, 337 (4th Cir. 1996) (For civil RICO claim, "plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation"). Despite their protestations to the contrary, the Biggs cannot show that they justifiably or reasonably relied on any representation of Countrywide to their detriment.

The Biggs characterize themselves as elderly borrowers of modest means who, on the basis of high pressure sales tactics by Countrywide or its minions, were induced to leave their fixed rate mortgage with another lender and refinance with Countrywide, becoming enmeshed in not one, but two payment option ARMs. They say this happened first in 2004, then again in 2006. But in support of its Motion for Summary Judgment, Countrywide has produced unrefuted

evidence of the Biggs' obvious sophistication in the matter of residential loans and ARMS in particular. Countrywide has demonstrated as a matter of law that the Biggs did not rely on any allegedly misleading representations about Countrywide's payment option ARMs.

Thus, Countrywide points out without contradiction that over the past 28 years the Biggs have refinanced their home mortgage no less than 12 times with at least 10 different lenders. They obtained their first ARM in 1997 with Baltimore American Mortgage Corporation. The initial annual interest rate for that loan was 7.65%, subject to change in two years, tied to an index, with 6.990% to be added to the then current index to reach an adjusted interest rate. The maximum interest rate would be 10.65%. In 2003, the Biggs refinanced by obtaining a fixed rate (5.25%) 30 year mortgage with Chase Manhattan Bank, cashing out some $ 92,000 after paying off their existing loan balance. Less than one year later, in July 2004, the Biggs moved to their first ARM with Countrywide, taking out a $299,700 30-year mortgage. The initial interest rate was 1.75%, subject to adjustment as of October 1, 2004, tied to an index, with 2.75% to be added to the then current index, resulting in a new adjusted rate. The maximum interest rate would be 9.95%. The Biggs were given the option, on the payment change date, of making a monthly payment that would fully amortize unpaid principal at a slightly enhanced interest rate or a more limited payment, but in any case the note made clear that any unpaid monthly interest would be added to unpaid

principal, *i.e.* there could be negative amortization. After five payment change dates, full monthly payments would be due.

Next came a loan transaction that the Biggs totally fail to discuss in their pleadings, though they do not deny it. In July 2006, after two years on the first Countrywide ARM loan and before being "induced" to refinance a second ARM loan with Countrywide, the Biggs entered into a 30 year fixed rate (5.25%) mortgage with Suntrust Bank, cashing out (or, more precisely, applying to credit card debt) over $35,000. Then, less than 2 months later, in September 2006, Jeanne Biggs (but not Charles Biggs)[6] entered into their second ARM loan with Countrywide, admitting in the process that she had been shopping extensively among several prospective lenders for the most advantageous loan terms. The loan from Countrywide was for $465,000 which, according to the HUD-1 settlement sheet, netted the Biggs over $111,000. The term of the loan was 30 years, the initial annual interest rate was 2%, with an interest rate change date of November 1, 2006, tied to an index, and 3.575% to be added to the index to arrive at the adjusted rate. The maximum interest rate would never be greater than 9.95%. Unpaid monthly interest would be added to unpaid principal. The note gave the Biggs different payment options: interest only, fully amortized payments over the 30 year term, or fully amortized payments over a 15 year term. Unpaid interest would be added to principal. After 10 payment change

6. Charles Biggs did, however, sign the Deed of Trust.

dates, the minimum monthly payment would be at the fully amortized payment rate. From what appears in the record, there was no penalty due if the loan were prepaid.

This is the undisputed factual basis upon which the Biggs attempt to stake their RICO claim, specifically the claim that they were misled as to their interest obligations under the payment option ARMs, and that they were placed in loans not suitable to their ages or station in life.[7] The Court rejects the Biggs' RICO claim as a matter of law. However aggressive Countrywide may have been in promoting its ARMs around the country in recent years, the Biggs simply cannot be considered to have relied on any of Countrywide's representations to their detriment. The undeniable fact is that at all relevant times, the Biggs were active and

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7. The Biggs also appear to claim that certain oral representations made by personnel of Eaglewood, Countrywide's "business partner," were misleading, *e.g.* "if the interest rate increases, you could refinance practically without charge" or "having a big principal balance favors you," or that "we (Eaglewood, *et al.*) will take care of anything that might come up regarding the refinancing." However, a mere statement of intention or of opinion or prophecy is not a promise and the mere expression of an intention or willingness to do something does not constitute a promise or give rise to contractual liability unless made with promissory intent. S. Williston, A Treatise on the Law of Contracts, § 1.2 (4th ed. 2007). Moreover, in connection with the 2006 Countrywide loan, Jeanne Biggs, the sole borrower, signed a document in which she expressly affirmed that no oral representations or promises had been made to her.

continuous shoppers of mortgage financing and that they possessed obvious and extensive experience with both fixed-rate loans and ARM loans. They also received substantial benefits in connection with the two Countrywide ARMs they now complain of, over $ 111,000 on the second one alone. They clearly knew, based on the 1997 ARM with Baltimore American Mortgage, that an ARM meant that the interest rate on the loan would be tied to an index and would be subject to an upward adjustment. They also knew from the 1997 ARM that unpaid interest would be added to unpaid principal, the obvious result being negative amortization. They knew that the interest rates on the ARMs were subject to a cap.[8] When fixed-rate mortgages were available, the Biggs took advantage of them. When ARMs offered better advantages, they opted for the ARMs; indeed, between their two ARMs with Countrywide, the Biggs held a fixed rate mortgage with Suntrust Bank. The fact that Countrywide's second ARM, as opposed to the first, may have offered different payment options makes little

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8. The following language appears in bold-face and in all capital letters at the top of the 2006 Adjustable Rate Note:

> THIS NOTE CONTAINS PROVISIONS THAT WILL CHANGE THE INTEREST RATE AND THE MONTHLY PAYMENT. THERE MAY BE A LIMIT ON THE AMOUNT THAT THE MONTHLY PAYMENT CAN INCREASE OR DECREASE. THE PRINCIPAL AMOUNT TO REPAY COULD BE GREATER THAN THE AMOUNT ORIGINALLY BORROWED, BUT NOT MORE THAN THE MAXIMUM LIMIT STATED IN THIS NOTE.

difference. The Biggs could easily have chosen as their payment option in connection with the 2006 ARM the same payment option available under the 2004 ARM or they could have opted for the fully amortizing principal and interest rate based on a 30-year loan term, which is what they presumably had with the fixed rate Suntrust loan they were supposedly induced to leave. The suggestion, therefore, that Countrywide somehow misled them is simply untenable, whatever duty lenders in some circumstances may be found to have with respect to ARMs.

Finally, any suggestion that Countrywide may have misrepresented the interest payments due from the Biggs under the 2006 ARM is flatly contradicted by the record. As Countrywide points out, the interest rates shown in the initial loan documents reflect the initial interest rates of the loan. Because the interest rate, by definition, was subject to adjustment over time depending on the index, the changing rates over the life of the loan could not be stated with any certainty, though to be sure a cap on the interest rate was stated. Similarly, the annual percentage rate set forth in the Truth in Lending Disclosure Statement provided to the Biggs, consistent with Regulation Z of Title 12 of the Code of Federal Regulations, 12 C.F.R. § 226.17(c), was properly based on the initial interest rate without adjustments.[9]

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9. The disclosures for a variable-rate transaction must be given for the full term of the transaction and must be based on the terms in

(Cont'd)

In sum, viewing the matter through the lens of summary judgment, the Biggs have not raised a genuine issue of material fact that they relied to their detriment on any representation on the part of Countrywide — whatever problems of understanding other borrowers may have with payment option ARMs.

Countrywide's Motion for Summary Judgment as to Count I is **GRANTED** and the Biggs' Cross-Motion as to this Count is **DENIED**.

IV.

In Count II, the Biggs allege that Countrywide took possession of funds belonging to them and converted those funds to its own use by disbursing monies from the Biggs' mortgage loans to itself and other parties.

While the Biggs seek monetary damages, they are not asking for the return of specific funds that Countrywide has been holding separate and apart. Inasmuch as money in general is not subject to a claim of conversion, this claim fails as a matter of law. *See, e.g., Darcars Motors of Silver Spring, Inc. v. Borzym*, 379 Md. 249, 841 A.2d 828, 834, n.3 (Md. 2004)

(Cont'd)

> effect at the time of consummation. Creditors should base the disclosures only on the initial rate and should not assume that this rate will increase.

12 C.F.R. Pt. 226, Supp. I.17(c)(1)(8) (rev. Jan. 2007)

("As a general rule, money, i.e., currency, is not subject to a claim of conversion unless the plaintiff seeks to recover specific segregated or identifiable funds").

Countrywide's Motion to Dismiss as to Count II is **GRANTED** and the Biggs' Cross-Motion for Summary Judgment as to Count II is **DENIED**.

V.

In Count III, the Biggs allege that Countrywide conspired with others to make money by putting homeowners into payment option ARMS with risky features from which more value could be extracted for the conspirators' own use, as opposed to leaving homeowners in their current mortgages. A civil conspiracy is a combination of two or more persons by agreement or understanding to accomplish an unlawful or tortious act or to use unlawful means to accomplish a lawful act and actual legal damage to the plaintiff. *Lloyd v. General Motors Corp.*, 397 Md. 108, 916 A.2d 257 (Md. 2007). Conspiracy, however, is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff. *NRT Mid-Atlantic, Inc. v. Innovative Props, Inc.*, 144 Md. App. 263, 797 A.2d 824, 838 (Md. 2002).

Because, as will be seen hereinafter, no separate claim of tort survives Countrywide's motion, the claim of conspiracy is subject to dismissal.

Accordingly, Countrywide's Motion to Dismiss Count III is **GRANTED**.

Appendix C

VI.

In Count IV, the Biggs assert a common law claim in fraud, viz. that Countrywide made fraudulent representations in connection with their loan transactions which the Biggs reasonably relied upon to their detriment.

As with their RICO claim, the Biggs submit that, in providing the 2004 ARM and 2006 ARM papers to them to execute, Countrywide in effect made representations that the 2004 ARM and 2006 ARMs were appropriate for senior citizens of modest means on a fixed pension, which representation was false. They also assert that the conduct and omissions of Eaglewood and its employees Sweeney and Crowe are attributable to Countrywide because Countrywide held out Eaglewood in writing as its partner.

Reprising its response to the RICO claim, Countrywide argues that it had no duty to place the Biggs in a loan most "suitable" to their age and financial condition. A lender, says Countrywide, makes no representations of "appropriateness" by agreeing to extend a loan to a borrower. Moreover, even if presentation of loan documents by Countrywide could be construed as a representation, that sort of representation cannot form the basis of fraud in Maryland as a matter of law. *See Alleco v. Weinberg Found. Inc.*, 340 Md. 176, 665 A.2d 1038, 1048-49 (Md. 1995) ("Acceptance of the plaintiffs' 'implied misrepresentation' theory would extend the scope of a

tort action for fraud or deceit beyond that recognized in our cases or, to the best of our knowledge, in cases elsewhere."). Finally, even if the Biggs could prove that Countrywide made a misrepresentation of material fact to them with respect to the 2006 loan, says Countrywide, they cannot prove reasonable reliance. Whereas the Biggs may not have understood the nuances of a pay option ARM prior to 2004, they gained that knowledge by entering into the 2004 loan agreement and by receiving the monthly mortgage statements reflecting the adjustable rates. The Biggs cannot, therefore, claim the same level of ignorance when they again entered into a second payment option ARM in 2006.

The Court agrees that the Biggs have failed to state a cause of action in fraud for the same reason they have failed to state a RICO claim. As a matter of irrefutable fact, they are unable to show that they reasonably relied on anything Countrywide or its supposed confederates might have said.

Countrywide's Motion to Dismiss Count IV is **GRANTED**.

VII.

In Count V, the Biggs claim that Countrywide made unspecified negligent misrepresentations that are actionable. Countryside says for the same reasons that the Biggs' fraud claim fails, their negligent misrepresentation claim also fails, citing *Cooper v. Berkshire Life Ins. Co.*, 148 Md. App. 41, 810 A.2d 1045

(2002) (identifying reasonable reliance and incurring of damages caused by such as two elements of negligent misrepresentation). The Court agrees.

To recover damages for negligent misrepresentation, the plaintiff must prove that:

1) the defendant, owing the plaintiff a duty of care, negligently misrepresented a material fact;

2) the defendant intended that the plaintiff would act in reliance upon the misrepresentation;

3) the defendant knew the plaintiff probably would rely on the misrepresentation, which if false would cause damages to the plaintiff;

4) the plaintiff justifiably acted in reliance on the misrepresentation; and

5) the plaintiff suffered damages as a result of the reliance on the misrepresentation.

Lloyd v. Gen. Motors Corp., 397 Md. 108, 916 A.2d 257, 273 (Md. 2007).

The Court finds that the same deficiency that characterizes the Biggs' claims for RICO violations and for fraudulent misrepresentation exists as to the

negligent misrepresentation claim. They cannot be heard to say that they relied on any such representations.

Countrywide's Motion to Dismiss Count V is **GRANTED**.

VIII.

In Count VI, the Biggs assert that Countrywide owed them a duty of care in processing their mortgage loan application and that Countrywide breached that duty, by putting them into a payment option ARM, the high risk features of which were not suitable for borrowers of their age and station. The Biggs rely primarily on *Jacques v. First Nat'l Bank of Md.*, 307 Md. 527, 515 A.2d 756, 762 (Md. 1986) ("[I]mplicit in the undertaking of the Bank to process the loan application is the agreement to do so with reasonable care.").

Countrywide finds *Jacques* to be inapposite; it does not, says Countrywide, establish the duty claimed by the Biggs. In *Jacques*, the bank refused to lend the full amount of the loan requested by the borrower under terms it had agreed to in the loan application, despite the fact that the bank knew that the borrower would be forced to proceed to settlement on his underlying purchase contract, regardless of how much money the bank agreed to lend. *Id.* at 529-30. *See also Silver Hill Station Ltd P'ship v. HSA/Wexford Bancgroup, LLC*, 158 F. Supp. 2d 631, 640 (D. Md. 2001) (limiting Jacques and holding that "[t]he Court therefore agrees with

Judges Ramsey and Smalkin that a lender in Maryland owes no duty in tort to reasonably process a loan, absent extraordinary risk or particular vulnerability or dependency on the part of the borrower."). Here Countrywide provided the full amount requested by the Biggs under the precise terms agreed to by them.

The Court agrees that *Jacques* provides no support for the Biggs' claim under the circumstances of this case. No authority stands for the proposition that banks owe a duty to elderly borrowers to place them in a more "suitable" loan, even while the borrowers are actively seeking and ultimately agree to some other, more burdensome loan. There is, to be sure, the possibility that mental impairment on the part of a contracting party, might permit the disavowal of a contract. That is a well-established part of the law. *See* Restatement (Second) Contracts, § 15 (1981). Presumably, insofar as specific elderly mortgagors might suffer from such mental limitations, it is arguable that they may be able to state a cause of action against an overreaching mortgagee, the precise parameters of which — particularly as to remedy — will have to await the development of a specific record in a given case. Here, however, there is no indication that the Biggs were suffering from mental disabilities that impaired their ability to enter into a loan contract. Quite the contrary, as the Court has noted; they were active, knowledgeable shoppers and beneficiaries of multiple mortgages, including ARMs. They were not placed into a loan transaction or transactions they could not understand. They were in a fixed rate mortgage with another lender

in between the two Countrywide ARMs they now complain of and could have stayed with that loan or sought another fixed rate loan instead of a second ARM. From all that appears, the Biggs actively sought the low teaser rate of the second Countrywide ARM. Given their prior experience with ARMs, they could hardly claim surprise when the rate quickly ratcheted up according to the terms of the loan. And whatever other payment options the second ARM offered, the Biggs clearly had the option of paying off the loan at the conventional 30 year full amortizable rate, with a cap on the interest rate of 9.95%. It may be that they were unable to afford those payments. But that is not something for which Countrywide can be faulted.

Countrywide's Motion to Dismiss Count VI is **GRANTED**.

IX.

A separate Order will be **ENTERED** implementing this decision.

/s/
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

September 17, 2008

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING FILED JANUARY 26, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1545
(8:07-cv-02768-PJM)

JEANNE BIGGS; CHARLES BIGGS,

Plaintiffs - Appellants

and

BORROWER NO. 0124854613, Mr. and Mrs. B.,

Plaintiff

v.

EAGLEWOOD MORTGAGE, LLC;
COUNTRYWIDE BANK, N.A.,

Defendants - Appellees

MARIA ABREU,

Movant

and

Appendix D

SETTLEMENT SOLUTIONS; AURORA LOAN SERVICES LLC; LEHMAN MORTGAGE CAPITAL; LEHMAN BROTHERS; KEVIN DECKER; MIKE SWEENEY; DONALD CROWE; MICHAEL A. PERRY,

Defendants

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Neimeyer and Judge Duncan.

For the Court
/s/ Patricia S. Connor, Clerk